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COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS.

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 DEPARTMENT OF THE TRIAL COURT
 BARNSTABLE SUPERIOR COURT
 DOCKET NO. 1772 CR 0107

SJ-2019-143

COMMONWEALTH OF MASSACHUSETTS

vs.

DEFENDANT'S APPLICATION
 FOR INTERLOCUTORY APPEAL

JASON MCCARTHY,

Defendant,

NOW comes the Defendant, in the above captioned matter and respectfully applies to the single justice of the Supreme Judicial Court, pursuant to Mass. R. Crim. P. 15 (a) (2), for an Application of interlocutory appeal. Counsel for the Defendant provides the following:

Issues Presented

1. The *Automatic License Plate Readers, hereafter (A.L.P.R.)*, on the Bourne and Sagamore Bridges, capture data/information and then electronically transmit it to stored, remote locations in the Commonwealth, therein constituting "electronic communications" as defined by and regulated by the *Electronic Communications Privacy Act, 18 U.S.C. sec. 2510-2522, and/or the Stored Communications Act, 18 U.S.C., 2701-2712*.
2. The Barnstable Police accessed and used the data of the *A.L.P.R.* system, collected over several months that *chronicled movements*, to conduct an investigation and to conduct a motor vehicle stop, violating the Defendant's reasonable expectation of privacy in the whole of his/her physical movements pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, Article 14 of the Massachusetts Declaration of Rights, and further violating his Right of Privacy pursuant to M.G.L. c.214, sec. 1B; M.G.L. c.276 sec. 1 and 1B.
3. The data/information that is captured, stored and transferred by the *Automatic License Plate Readers, hereafter (A.L.P.R.)*, as well as, the mechanical, electronic, computer and communications system on the Bourne and Sagamore Bridges, is activity governed by the *Electronic Communications Privacy Act, 18 U.S.C. sec. 2510-2522, and/or the Stored Communications Act, 18 U.S.C., 2701-2712*, and accessing/use of the data/information without either a warrant, a court order, and/or probable cause is a violation of these Acts, and violated the Defendant's rights.
4. It was prejudicial error, in violation of 18 U.S.C. sec. 2518 (9), for the Motion's Hearing Judge to have allowed into evidence at the Motion hearing, evidence of the data/information

captured by the *Automatic License Plate Readers (A.L.P.R.)*, without the Commonwealth having met the pre-requisites of the statutory scheme therein delineated in 18 U.S.C. sec. 2518 (9).

5. The *Massachusetts State Police General Order TRF-11, Effective Date: July 22, 2014, entitled Automatic License Plate Recognition*, that was adopted by the Barnstable Police Department, is not specific enough to protect the rights of the Defendant and all citizens of the Commonwealth, therein allowing for general searches and seizures of information in which the citizens of the Commonwealth have a reasonable expectation of privacy, specifically the whole of their physical movements, as well as, potential capture of personal information. It was error for the Motion's hearing Judge to have found that the Policy was constitutionally adequate pursuant to the Massachusetts Declaration of Rights and United States Constitution. *Commonwealth v. Silva*, 61 Mass. App. Ct. 28 (2004); *Commonwealth v. Rostad*, 410 Mass. 618 (1991); *Commonwealth v. Bishop*, 401 Mass. 449 (1988).

6. Through the use of Target Standing, the Defendant should have been allowed to challenge the actions of the Barnstable Police in that they engaged in "*distinctly egregious conduct*" in stopping the Defendant, who was the co-Target of their investigation. The drugs the Defendant is charged with distributing were found on the co-Target's person.

7. The Defendant, was ordered out of a car, placed in handcuffs, detained at the side of the road, placed in a police cruiser, taken to the Barnstable Police Department, and brought into an interrogation room in handcuffs. He was then questioned while handcuffed. He was confused by his true legal status, whether he was "*detained*", "*not under arrest*", "*arrestable*", "*not going to court*" there "*voluntarily*" or not. He was given inducements and false promises to make admissions. He was read his rights but told:

He was told: "*You are not under arrest. You are being detained and you are handcuffed.*"

He was told: "*Not booked and not placed under arrest. You are being detained.*"

He asked: "*How long am I being detained?*" and was told: "*You're here voluntarily at this point.*"

He asked: "*Are you's [sic] arresting me?*" and he was told: "*The ball's in your court. Everybody get's a bite at that apple. You haven't been charged yet. You still might be charged. Right now you haven't You are arrestable. You haven't given us any information.*" A quid pro quo promise.

He asked: "*So now I need to go to Court?*" and he was told: "*You haven't been charged yet.*" What was his legal status?

He then asked: "*Why am I being held?*"

He was then told: "*We can arrest you today and you can decide whether you want to cooperate for information on this case or you can give us information now, and we can*

bring it to our boss and see if there is anyway we can charge you in the future, or not charge you at all, it depends on how good your information is. Tell us who your source is?" Another quid pro quo promise.

He asks: *"Am I being let go?"* No answer was given.

Again he asked: *"So how long am I being detained? How much time is this going to take? and he is told: "Depends on how much more information you want to give us. Well, even if we put a case on you now, you'd still be in a position to help us out. Or help yourself out."*

The Barnstable Police secured admissions, all the while the Defendant never knowing his legal status so to be able to make an informed decision as to whether to assert his rights or not. The Defendant was then charged with these offenses.

8. The Barnstable Police illegally and without probable cause, interfered with the Defendant's right to bail by seizing the bail money that was brought to the Police station for him. They then independently applied so much of the same money to allow the release of a co-Defendant, while detaining the Defendant, and arbitrarily telling him he had to come-up with a second sum of money, equal to the first sum of bail money that had been set by the Bail Magistrate. The Bail Magistrate was not involved in the setting of the second sum nor in the seizure of the first sum. In so doing, the Barnstable Police violated Equal Protection clauses of the Massachusetts Declaration of Rights and the United States Constitution, the provisions of M.G.L. c.276, sec. 58, and illegally seized bail money in violation of the provisions of M.G.L. c.94C, sec. 47. The Barnstable Police also violated Article XXVI of the Massachusetts Declaration of Rights by imposing excessive bail in derogation of the Bail Magistrate's Order.

9. Reasonable suspicion, as well as, probable cause failed to exist to conduct a motor vehicle stop of the Defendant, to order him out of the car, to place him in handcuffs, and to transport him back to the Barnstable Police Department.

Summary of Facts

1. Prior to February 22, 2017, the Defendant became a Target of a drug investigation by the Barnstable Police Department of heroin/fentanyl being supplied.
2. Using several months of data obtained from the *A.L.P.R's* on the Bourne and Sagamore Bridges relative to the car operated by the Defendant, the Barnstable Police received a real time alert on February 22, 2017, that the car was coming over the bridge.
3. The Barnstable Police set up surveillance. Following the car, they observed the Defendant's vehicle drive down the end of a residential neighborhood road not known as a high crime area. They observed a Co-Defendant's car do the same. Not having the vantage point of witnessing a hand-to-hand or any exchange, the Police stopped both cars as they drove away in opposite directions.

4. Both the Defendant and the Co-Defendant were immediately removed from their vehicles and placed in handcuffs. The Co-Defendant was questioned. He told the Police he had paid the Defendant for some marijuana he had purchased in the past. He was then pat-frisked and a finger of suspected fentanyl was felt in the back of his pants. He was taken to the Barnstable Police Department where it was removed. The Defendant, still standing on the side of the road, in handcuffs, was then put in a cruiser and taken to the Barnstable Police Department. His girlfriend, who was a passenger in his car, was also taken brought to the Police Department in handcuffs.
5. The Police interrogated all parties. The Defendant was read his rights and interrogated.
6. After the interrogation, all parties were charged criminally.
7. A Bail Magistrate was called. The Bail Magistrate set bail on the Defendant at \$10,000.00, with a \$40.00 fee for the Defendant and a \$40.00 fee for his girlfriend. The Defendant called his brother to secure the bail money. While the Defendant was talking to his brother, the Police were listening. The Brother appeared with the \$10,080.00. The bail money was seized by the Barnstable Police. The Defendant was held in custody and told he had to come up with an additional \$10,000.00 to be released. The Police then on their own volition, applied \$40.00 of the original \$10,000.00 to allow the Defendant's girlfriend to be released. The Defendant was held in custody until a subsequent sum of \$10,000.00 was brought to the Police Department, the Defendant then having tendered \$20,000.00 to secure his release.
8. Motions to Dismiss, and to Exclude Evidence, and to Suppress, and for the Return of the seized Money were filed by the Defendant.
9. Hearings were conducted by the Honorable Judge Robert C. Rufo. Live witness testimony and arguments were given.
10. After hearing and pursuant to written *Findings of Fact and Rulings of Law*, dated March 11, 2019, all Motions were denied.

EXPLANATION OF HOW THE ADMINISTRATION OF JUSTICE WOULD BE FACILITATED BY THE GRANT OF LEAVE TO APPEAL

WHEREFORE, Counsel states that an interlocutory appeal in this case will facilitate the administration of justice in that:

1. The issues presented are novel and of first impression in the Commonwealth and in the region;
2. Without the evidence that was sought to be suppressed, specifically the Automatic License Plate Reader (A.L.P.R.) data, the Commonwealth's proof at pretrial Motions would have been insufficient for the Barnstable Police to have known the locations of Jason McCarthy and

Brian Whitmore, Sr., in order to affect a stop of their cars, and no evidence would have been derived, and no criminal charges could have issued.

3. The evidence that was not suppressed including statements post-arrest will definitively limit, if not negate, the Defendant's ability to have a successful trial.

4. In order to preserve his right for the normal appellate procedure the defendant would be forced to go to trial and waste judicial resources and be placed in jeopardy, where this interlocutory appeal could be dispositive of the entire case.

ESTIMATE OF THE LENGTH OF TRIAL:

3-7 days

NEXT SCHEDULED TRIAL COURT EVENT:

Final Pretrial Conference – May 22, 2019

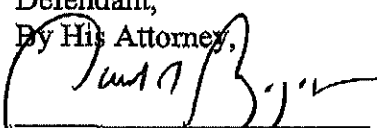
AFFIRMATIVE REPRESENTATION:

This Application for Interlocutory Appeal is timely pursuant to Mass. R. Crim. P. 15 (b) (1), since 30 days has not elapsed since the date of the Findings and Rulings being appealed which are dated March 11, 2019.

IN SUPPORT HEREOF, and attached are:

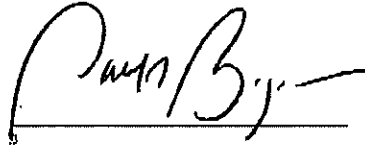
1. The Findings of Fact and Rulings of Law of the Robert C. Rufo, Justice of the Superior Court, dated March 11, 2019;
2. Brief *Memorandum of Law* by Jason McCarthy;

Respectfully Submitted,
Jason McCarthy,
Defendant,
By His Attorney,


Paul A. Bogosian
Attorney At Law
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CERTIFICATE OF SERVICE

I, Paul A. Bogosian, Esq., hereby certify that a true and accurate copy of this Motion with Supporting Affidavit was served, via Certified 1st Class Mail, upon the Barnstable County District Attorney's Office, on April 8, 2019.

A handwritten signature in cursive script, appearing to read "Paul Bogosian", written over a horizontal line.

Paul A. Bogosian